STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 250437 Wayne Circuit Court
MICHAEL BANKS MORGAN, Defendant-Appellant.	LC No. 03-001476-02

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Michael Banks Morgan appeals as of right his jury trial convictions of first-degree felony-murder,[1] assault with intent to rob while armed,[2] and conspiracy to assault with intent to rob while armed.[3] Defendant was sentenced to concurrent terms of life imprisonment for his murder conviction and thirty-seven years and six months to one hundred years' each for his assault and conspiracy convictions. We affirm.

I. Factual Background

Defendant's convictions arose from an attempted robbery and the subsequent murder of Michael Connor that occurred during the robbery. The prosecution presented evidence that defendant was a drug dealer who claimed that Connor owed him a large sum of money. Jeremiah Brooks testified that defendant, who was on a tether at the time, arranged for Eladio Nino and Patrick Bates to take money and drugs from Connor at his home. Because Brooks was working off a debt he owed defendant, he was enlisted as the lookout. Brooks testified that defendant assured him that the robbery would not be reported. Brooks testified that defendant was aware that one of the men was carrying a taser and offered them a gun as well. Defendant instructed the men to wait until a Taurus left Connor's driveway before entering.[4]

[1] MCL 750.316(1)(b).

[2] MCL 750.89.

[3] *Id.*

[4] The Taurus was actually a Sable belonging to Connor's mother.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

At approximately 7:00 a.m. on March 23, 2001, Nino, Bates, and Brooks parked Nino's black SUV at the end of Connor's driveway. All three men were armed.[5] After the Sable left the driveway, Nino attempted to enter the front door while Bates and Brooks went to the side door. Finding the door locked, Brooks knocked. When Connor answered, Bates punched Connor in the face and chased him into the house. Bates struggled with Connor, hitting him on the head with his gun while Connor fought back with a small souvenir baseball bat. Ultimately, Bates shot Connor in the head. Bates and Brooks then ran back to the vehicle, followed by Connor's father and brother who were awakened by the gunshot. The men were able to reenter the SUV and drive away.

After parking the SUV at an apartment complex, burying their weapons in a field and hiding behind a nearby party store, the men called defendant for a ride. As defendant could not leave his home, he sent his girlfriend, Dina Kellums, to pick them up. About two to four weeks later, defendant accompanied the others to retrieve the buried weapons. Upon Nino's instruction, Brooks threw the shells and a bullet casing from the murder weapon over a bridge. Subsequently, defendant destroyed the murder weapon.[6] Nineteen months passed before any of the men were arrested for their role in the attempted robbery and murder of Connor.

II. Insufficient Evidence

We first address defendant's claim that there was insufficient evidence to sustain his conviction of felony murder. Defendant contends that because the homicide was outside the scope of the common criminal plan and was the unforeseen and unanticipated result of an attempted robbery, there was insufficient evidence to establish the requisite intent for felony murder. Viewed in a light most favorable to the prosecution, there was sufficient evidence presented to justify a rational trier of fact in finding that the element of intent was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Contrary to defendant's argument, there was sufficient evidence to sustain defendant's convictions of felony murder on an aiding and abetting theory. The requisite intent for a conviction as an aider and abettor is that necessary to be convicted as a principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). The prosecution must show the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 757-758. A defendant's knowledge that an accomplice was armed during the commission of an armed robbery is sufficient for an inference of malice. *People v Turner*, 213 Mich App 558, 567, 572-573; 540 NW2d 728 (1995), overruled in part on other grounds *Mass*, *supra* at 627-628.

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[5] Brooks testified that one of the weapons used by the men belonged to defendant.

[6] The facts surrounding the actual attempted robbery and murder and the subsequent cover-up are not in dispute.

There was ample evidence of defendant's involvement in the events leading to the shooting as well as the cover-up. The prosecution presented evidence that defendant planned and organized a robbery in which three men, armed with guns, confronted Connor at his home to steal money and drugs from him. According to Brooks' testimony, during the planning, defendant indicated that he had a gun that could be used if needed and Brooks recognized one of the guns used in the robbery as one defendant had "showed off" a year earlier at his home. The jury could infer that defendant knew that the men would be armed and that he supplied at least one of the guns. There was also evidence that defendant participated in the cover-up after the shooting, including grinding up the murder weapon on a grinder in defendant's garage. The evidence was sufficient to establish that defendant intentionally set in motion a force likely to cause death or great bodily harm and, therefore, had the requisite malice to be convicted of felony murder. *Carines, supra* at 759-760; *Turner, supra* at 572-573.

III. Right of Confrontation

Defendant contends that the trial court improperly admitted statements made by Bates to Michael Broome regarding his role in the attempted robbery and murder. The statements were admitted pursuant to MRE 804(b)(3) over defendant's pretrial objection. In these statements, Bates implicated defendant in planning the attempted robbery that led to the murder of Connor. Defendant asserts that the trial court improperly admitted the statement pursuant to *People v Poole*,[7] as that case was overruled by *Crawford v Washington*[8] and several other previous United States Supreme Court cases.[9] Defendant argues that even if *Poole* is binding precedent, the statement would be inadmissible because it lacks adequate indicia of reliability. Defendant alleges that the trial court failed to make this threshold determination before placing the issue before the jury. Without this evidence, defendant contends that the only charge of which he could be convicted is accessory after the fact,[10] an offense with which the prosecution failed to charge defendant. We disagree.

"We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo."[11] MRE 804(b)(3) provides that a statement is excluded from the hearsay rule if the declarant is unavailable and the statement "so far tended to subject

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[7] *People v Poole*, 444 Mich 151, 153-154; 506 NW2d 505 (1993).

[8] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[9] Defendant asserts that *Poole* was overruled by *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), and *Williamson v United States*, 512 US 594; 114S Ct 2431; 129 L Ed 2d 476 (1994).

[10] MCL 767.67. Pursuant to this section, "Any number of accessories after the fact . . . may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice." *Id.* Accessory after the fact is a common-law offense, punishable pursuant to MCL 750.505, in which the offender, "'with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment.'" *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978), quoting Perkins, Criminal Law (2d ed), p 667.

[11] *People v Shepherd*, 263 Mich App 665, 667; 689 NW2d 721 (2004).

the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

Brooks testified that he cooperated with the police following his arrest to gather evidence against his coparticipants. Brooks telephoned Bates approximately five times attempting to elicit incriminating statements under the guise of blackmailing Bates for his silence. Bates told Broome, an old friend and the brother of Bates' girlfriend, that he was being blackmailed and made several statements indicating that he shot Connor and implicating defendant in the planning of the attempted robbery.[12] Bates was also charged in connection with the attempted robbery and murder of Connor and was, therefore, unavailable to testify at defendant's trial because he exercised his right against self-incrimination.

We first reject defendant's contention that the Michigan Supreme Court's decision in *Poole* has been overruled by United States Supreme Court precedent. *Crawford v Washington* prohibits, as violative of the Confrontation Clause, the admission of *testimonial* statements of unavailable witnesses when there's been no opportunity for cross-examination.[13] To the extent that *Poole* could be applied to testimonial statements, defendant correctly asserts that it has been partially overruled by *Crawford*. However, where the declarant's statements are nontestimonial hearsay, *Poole* remains in effect.[14] Furthermore, this Court has specifically held that *Williamson*

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[12] Broome testified regarding Bates' statements implicating defendant as follows:

> Well, Patrick Bates had told me how they went to go rob this kid and that things didn't turn out the way they expected and the kid ended up the [sic] getting killed.
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> * * *
>
> He had told me that Michael Morgan had set it up to where him, one of his friends, well, Patrick Bates, Eladio Nino and one of Morgan's friends would go rob this kid. From there, they had went, the kid wouldn't give up the money or anything and [Bates] and the kid ended up struggling and the kid ended up getting shot.
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> * * *
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> That [Morgan] was going to send his friend with Eladio Nino and Patrick Bates because he couldn't go with them because he was on house arrest or on tether [sic]. So he sent his friend because he knew the house and I guess he knew the kid, sir.

[13] *Crawford*, *supra* at 1363-1367.

[14] *Id.* at 1374. When analyzing nontestimonial hearsay, this Court recently found that:

> *Crawford* left [*Ohio v*] *Roberts*[, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980),] intact regarding the admissibility of nontestimonial statements. The admission of [challenged] statements as substantive evidence does not violate the Confrontation Clause if the prosecution can establish that [the declarant] was

(continued…)

v United States and *Lilly v Virginia* did not overrule *Poole*.[15] Although the Michigan Supreme Court has never addressed the issue specifically, it has continued to rely on *Poole*.[16]

Here, Bates told a friend about his role in a murder. Bates made these statements more than a year after the murder when a coparticipant began blackmailing him. These were not statements made to the authorities or made by the victim. They were made by one criminal participant to someone completely uninvolved in the offense. Bates would not have anticipated that his statements would later be used against him at trial. In fact, Broome testified that he only implicated Bates to the police to avoid prosecution following his own arrest on a completely unrelated drug charge.[17] Accordingly, we find that Bates' statements to Broome were not testimonial under any definition of the term.

Because Bates' statements are nontestimonial, we must determine if they were properly admitted pursuant to *Ohio v Roberts*, and the Michigan cases of *Poole* and *Washington*. The admission of the statement as substantive evidence does not violate the Confrontation Clause if Bates was unavailable as a witness and his statement bore adequate indicia of reliability. *Washington, supra* at 671. In *Poole*, the Michigan Supreme Court provided the following guidance concerning this inquiry:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends,

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> unavailable as a witness and that the statements bore adequate indicia of reliability, or if the statements fell within a firmly rooted hearsay exception. [*Shepherd*, *supra* at 676, citing *People v Washington*, 468 Mich 667, 671-672; 664 NW2d 203 (2003).]

Our application of *Ohio v Roberts* to Michigan cases based on the Michigan Rules of Evidence is controlled by the Michigan Supreme Court's analysis in *Poole* and *Washington*.

[15] *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000) (because federal interpretations of federal rules of evidence are merely persuasive in interpreting their local counterparts, *Williamson* does not bind Michigan courts), and 558-559, citing *Texas v Brown*, 460 US 730, 737; 103 S Ct 1535; 75 L Ed 2d 502 (1983) (because plurality opinions are not binding, *Poole* remains intact following *Lilly*).

[16] See *People v Deshazo*, 469 Mich 1044; 679 NW2d 69 (2004); *Washington, supra*.

[17] Broome testified that he was about to enter the military when he was arrested for selling ecstasy. He immediately told the police about Bates', and the other participants', role in the murder to avoid a charge that could affect his career.

> colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. See, generally, *United States v Layton*, 855 F2d 1388, 1404-1406 (CA 9, 1988). While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant.[18]

In this case, Bates' statements meet three of the four *Poole* factors in favor of admissibility. Bates voluntarily made the challenged statements. He made the statements to Broome, a friend and the brother of his girlfriend—someone to whom he would likely speak the truth. The statements were not made in response to prompting or inquiry by Broome.[19]

Although the statements were not contemporaneous with the charged offense, the circumstances do not otherwise support a finding of inadmissibility. There is no suggestion that Bates had a motive to lie or distort the truth. There also is no indication that he made the statements to avenge himself or curry favor. Bates did not make the statements to law enforcement officers, and he did not minimize his role or responsibility. Although Bates implicated Nino and defendant by name as coparticipants in the planning and implementation of the attempted robbery, he admitted that he shot Connor in the head. Given the totality of the circumstances, we find the statement sufficiently reliable for admission.

Even if the admission of the statement was error, as the dissent concludes, we do not agree that Brooks' testimony was "highly impeached" and that the jury might not have convicted defendant absent the hearsay testimony at issue. Brooks participated in the robbery and testified at length concerning the details of the planned robbery, the shooting, and defendant's involvement. Brooks' testimony was corroborated by physical evidence, including the souvenir baseball bat found at the murder scene, Brooks' hat found in the field where he discarded it after the murder and, perhaps most telling, the recovery of one spent shell casing and five bullets from

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[18] *Poole*, *supra* at 165. See also *Washington*, *supra* at 672-673; *Shepherd*, *supra* at 676-677.

[19] Defendant accurately points out that Broome asked Bates about some phone calls that appeared to upset Bates, after which Bates made statements concerning the robbery and murder, but Bates nonetheless talked about the shooting of his own accord and not in response to any direct inquiry.

under the bridge where Brooks said they had been thrown. In addition, Brooks' testimony was corroborated, in part, by defendant's former girlfriend, Dina Kellums' testimony that she picked up the three perpetrators after the murder and drove them back to defendant's home.

As plaintiff argues, the hearsay evidence of Bates' statements to Broome were cumulative of the corroborated testimony of Brooks, and, further, defendant's own incriminating statements demonstrated his guilt. We conclude that any error in the admission of Bates' statements to Broome was harmless.[20]

IV. Instructional Errors

Defendant asserts that the trial court erred in failing to give an imperfect self-defense instruction and gave an erroneous accessory-after-the-fact instruction. Generally, we review claims of instructional error de novo.[21] However, because defendant failed to request an imperfect self-defense instruction or raise an objection to the instructions[22] on either of the grounds argued on appeal, our review is limited to plain error affecting defendant's substantial rights.[23] It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.[24] "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them."[25] Jury instructions must be read as a whole to determine if the trial court committed error requiring reversal.[26] The instructions need not be perfect, but must fairly present the issues and sufficiently protect the defendant's rights.[27]

A. Accessory After the Fact

Defendant challenges the manner in which the trial court gave the requested accessory-after-the-fact instruction. Defendant contends that the trial court should have clearly instructed the jury that accessory after the fact is a separate and distinct offense from any offense prosecuted on an aiding and abetting theory. Defendant asserts that the instructions as given

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[20] We acknowledge that there is a difference of opinion in this Court regarding the standard to be applied to a harmless error analysis of preserved constitutional error. See *People v Shepherd*, 263 Mich App 665; 689 NW2d 721 (2004). However, this difference is not germane to the outcome of this case.

[21] *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

[22] In fact, defense counsel indicated that he was satisfied with the instructions as given.

[23] *Carines, supra* at 763-764.

[24] *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003).

[25] *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

[26] *Katt, supra* at 310.

[27] *Id.*, quoting *Canales, supra* at 574.

indicate that accessory after the fact is merely an alternative method of ascertaining guilt on an aiding and abetting theory.[28]

Defendant correctly asserts that accessory after the fact is separate and distinct from aiding and abetting. A person may not be convicted of aiding and abetting in the commission of a crime based on his conduct as an accessory after the fact.[29] In *People v Lucas*, the Michigan Supreme Court found that the language "concerned in the commission of an offense" in MCL 767.39 precluded from aiding and abetting any acts of assistance amounting to accessory after the fact.[30]

This case is distinguishable from *Lucas* because the trial court did not affirmatively instruct the jury that accessory after the fact was an alternative method of establishing that a

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[28] The trial court instructed the jury as follows:

> To prove this charge the Prosecution must prove the following elements beyond a reasonable doubt. And this goes to aiding and abetting. First that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else was convicted of that crime.
>
> Second that before or during the crime, the defendant did something in the commission or to assist in the commission of that crime, and third the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.
>
> Ladies and gentlemen, the court will define for you accessory after the fact because there is testimony that may give you reason to consider accessory after the fact and the parties have asked for this instruction. The court is going to give you a definition at this point.
>
> An accessory after the fact is defined as follows: Access [sic] after the fact is a person who with knowledge of the other persons [sic] guilt gives assistance to a felon in an effort to hinder the felons [sic] detection, arrest, trial or punishment.
>
> Now ladies and gentlemen as far as mere association. Mere association even with the knowledge that a crime was planned or was committed is insufficient to establish the defendant Mr. Morgan aided or assisted in the commission of that crime.
>
> Now it does not matter how much help, advice or encouragement Morgan gave; however, you must decide whether Mr. Morgan intended to help another commit the crime and whether his help advice [sic] or encouragement actually did help advise [sic] or encourage the crime.

[29] *Lucas*, *supra* at 304-305, citing *People v Wilborn*, 57 Mich App 277, 282; 225 NW2d 727 (1975).

[30] *Id.* at 305.

defendant aided and abetted in the commission of a crime. Here, after rejecting defendant's confusing proposed instructions on aiding and abetting, the trial court properly instructed the jury of the prosecutor's burden of proof: that defendant aided or abetted before or during the crime. This instruction was not modified nor made confusing by defining accessory after the fact. In light of the evidence of defendant's conduct during and after the crime, we cannot conclude that he has demonstrated plain error affecting his substantial rights.

B. Imperfect Self-Defense

Defendant also contends that he was denied a fair trial because the trial court did not sua sponte instruct the jury on the imperfect self-defense doctrine. Defendant claims that Bates' shooting of Connor qualified for an imperfect self-defense instruction, which would lower defendant's culpability and require a conviction for manslaughter, rather than felony-murder.

A successful imperfect self-defense theory can mitigate second-degree murder to voluntary manslaughter by negating the malice element.[31] This doctrine applies only if (1) the defendant would have been entitled to invoke lawful self-defense had he not been the initial aggressor, and (2) the defendant did not use more force than necessary, even if under an honest and reasonable belief that his life was in danger.[32]

A rational view of the evidence does not support the imperfect self-defense doctrine. Bates shot Connor because Connor hit him with a miniature souvenir baseball bat after Bates had punched him, invaded his home, chased him through the house, ordered him onto the ground at gunpoint, and hit him with a gun. Bates made no attempt to retreat and used more force than necessary to repel Connor's nonlethal attack. Furthermore, "a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request."[33] Because defendant failed to request this instruction and the instruction is not supported by the evidence, we find no plain error.

Affirmed.

/s/ Janet T. Neff
/s/ Roman S. Gribbs

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[31] *People v Kemp*, 202 Mich App 318, 323-324; 508 NW2d 184 (1993). The Michigan Supreme Court has neither recognized nor rejected imperfect self-defense as a theory that would reduce first-degree murder to manslaughter. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999).

[32] *Kemp, supra* at 325 & n 2.

[33] *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).